RECORD
AND
BRIEFS

No. 14-86

Supreme Court, U.S.
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In The

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED BY RESPONDENT

The Question Presented by Petitioner is not premised upon the actual factual findings below and exaggerates the question presented by this case. Accordingly, Respondent identifies the appropriate Question Presented as follows:

Whether an applicant adequately informs a prospective employer of the need for a religious accommodation under Title VII simply by wearing an item of clothing which can be but is not always associated with a particular religion.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Abercrombie & Fitch Stores, Inc. ("Abercrombie") discloses that its parent corporation is Abercrombie & Fitch Co., which is a publicly traded company. No other publicly-held corporations own 10% or more of Abercrombie's stock.

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STATEMENT

Petitioner's statement of the Question Presented to this Court exaggerates the significance of the holding of the Court of Appeals for the Tenth Circuit by claiming that the question presented is whether an employer who has "actual knowledge" of a conflict between a job applicant's compulsory religious practice and an employment requirement must accommodate the practice under Title VII of the Civil Rights Act of 1964 only when that knowledge comes "from direct, explicit notice from the applicant." Petition, at (i). However, the employer in this case, Respondent Abercrombie & Fitch Stores, Inc., did *not* have actual knowledge of a religious conflict from *any* source. The EEOC's Petition attempts to avoid the obvious legal consequence of this basic factual finding made below based upon undisputed testimony. Given the factual record, this case is simply not the proper vehicle for the EEOC to advance the legal question presented in the Petition.

The true issue presented is whether an applicant adequately informs a prospective employer of the need for a religious accommodation under Title VII simply by wearing an item of clothing which can be but is not always associated with a particular religion. Every circuit court that has addressed this issue has confirmed that more is required of an applicant before an obligation will be imposed on the prospective employer to provide an accommodation. Indeed, the EEOC's own regulations and guidance require an

applicant to inform the employer of a conflict between a religious belief and a requirement of employment.

Because there are no conflicts among the decisions of the United States circuit courts on this question, and the decision by the Tenth Circuit Court of Appeals in the present case does not conflict with any decisions of this Court, the Petition for a Writ of Certiorari should be denied.

A. Factual Background

Samantha Elauf applied for a Model position at the Abercrombie Kids clothing store in the Woodland Hills Mall in Tulsa, Oklahoma, at the suggestion of a friend, Farisa Sepahvand, who worked at the store. Pet. App. 5a.[1] In Abercrombie stores the Model position is a part-time position analogous to sales associate positions in other stores, except that Abercrombie Models are expected to model the Abercrombie style to customers. Pet. App. 3a. Ms. Sepahvand told Ms. Elauf that the Abercrombie store had a "Look Policy" that prohibited black clothing and required Models to wear clothing styles similar to the clothing sold at the store. *Id.*

Abercrombie expends substantial effort to ensure its customers receive a consistent brand-based, sensory experience in its stores. Pet. App. 3a. Abercrombie

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[1] "Pet. App." refers to the appendix to the petition for certiorari submitted by Petitioner EEOC.

does little or no advertising and the strength of its brand is based on adherence to the Look Policy. Pet. App. 3a-4a. An Abercrombie Model who violates the Look Policy by wearing inconsistent or distracting clothing "inaccurately represents the brand, causes consumer confusion, fails to perform an essential function of the position and ultimately damages the brand." Pet. App. 4a. Accordingly, Abercrombie's interview guide for Models requires managers to consider an applicant's "appearance and sense of style." Pet. App. 8a.

Ms. Elauf testified that she is a practicing Muslim and has worn a headscarf since she was thirteen years old for religious reasons. Pet. App. 5a. Dr. John L. Esposito, an expert on Islam retained by the EEOC, testified that although some religious scholars believe that the Quran – the sacred scripture of the Islamic faith – requires women to wear a headscarf, there are many who disagree with this interpretation. *Id.* Dr. Esposito testified that some Muslim women do not believe that wearing a headscarf is obligatory, and other Muslim women wear headscarves for many reasons other than religious beliefs, including personal or cultural reasons. Pet. App. 2a, 5a-6a. Dr. Esposito testified that the reason a woman wears a headscarf would "really depend on the woman." *Id.*

Abercrombie instructs its managers not to assume facts about prospective employees in a job interview and not to ask applicants about their religion. Pet. App. 4a. If, during an interview, a

prospective employee requests a deviation from the Look Policy, Abercrombie instructs its managers to contact their direct supervisor or Abercrombie's corporate human resources department ("HR"). *Id.* HR managers may grant accommodations if doing so would not harm the brand. *Id.*

Ms. Elauf interviewed for the Model position with Heather Cooke, a 23-year-old assistant manager. Pet. App. 7a. Before her interview, Ms. Elauf knew the position required her to model the Abercrombie style; knew the style of clothing that Abercrombie sold; and also knew that Abercrombie did not sell headscarves. *Id.* Ms. Elauf had been cautioned not to wear black clothing to the interview but nonetheless wore a black headscarf even though she held no religious belief that required her to wear black. Pet. App. 3a, 5a-7a.

It is undisputed that Ms. Cooke "did not know" that Ms. Elauf was Muslim or that Ms. Elauf believed her religion required her to wear a headscarf. Pet. App. 7a. Rather, Ms. Cooke "just assumed that she was Muslim because of the headscarf." *Id.* Ms. Cooke followed a scripted interview guide prepared by Abercrombie and, consistent with the training she received from Abercrombie, did not ask anything about Ms. Elauf's religion. Pet. App. 4a, 8a.

During the interview, Ms. Elauf did not inform Ms. Cooke that she was Muslim, that she wore a headscarf for religious reasons, or that she was obligated by her religious beliefs to wear the headscarf at

work. Pet. App. 7a. Ms. Cooke described some of the Company's dress requirements for Model as set forth in the Look Policy and then asked Ms. Elauf if she had any questions. Ms. Elauf asked no questions. Pet. App. 8a.

Ms. Cooke was unsure about the black headscarf under the Look Policy, so she asked the district manager, Randall Johnson. Pet. App. 8a. Mr. Johnson told Ms. Cooke that under the Look Policy, models were not allowed to wear hats at work. At Mr. Johnson's instruction, Ms. Cooke rated Ms. Elauf as a "1" out of 3 in the "appearance and sense of style" category, which resulted in Ms. Elauf not being offered the Model position. Pet. App. 9a.

B. Proceedings Below

Petitioner Equal Employment Opportunity Commission ("EEOC") filed suit against Abercrombie in the United States District Court for the Northern District of Oklahoma pursuant to Title VII, as amended, and alleged that Abercrombie had failed to accommodate Ms. Elauf's religious practice of wearing a headscarf. The EEOC pursued only a failure to accommodate claim; it did not advance a disparate treatment claim.

The district court granted summary judgment to the EEOC and denied Abercrombie's motion for summary judgment. Pet. App. 92a.

The court of appeals reversed the district court's ruling. Pet. App. 1a. It relied upon the undisputed fact that Ms. Elauf had never informed Abercrombie that she felt obligated to wear a headscarf for religious reasons and that Abercrombie had no actual knowledge of that fact from any other source. The court of appeals rejected the EEOC's argument that it was unnecessary for Ms. Elauf to inform Abercrombie that she felt religiously obligated to wear the headscarf. It held that:

> [O]rdinarily plaintiffs must establish that they initially informed the employer that they engage in a particular practice for religious reasons and that they need an accommodation for the practice due to a conflict between the practice and the employer's work rules.

Pet. App. 46a. The court of appeals stated that it found ample support for its decision in its own case law, case law from other circuits, the EEOC's own regulations, and analogous case law under the Americans with Disabilities Act. Pet. App. 29a. The court of appeals noted that, even in the few decisions which did not require the applicant to specifically "inform" the employer of the conflict, the employer must have "particularized, actual knowledge of the key facts that trigger its duty to accommodate" from some source, which indisputably did not happen in this case. Pet. App. 34a.

The court of appeals also explained that it had reached the only logical and practical resolution. Pet.

App. 46a. ("we are hard pressed to see how we could logically reach any other conclusion"). The court of appeals noted that because an applicant's religious beliefs are inherently personal and are generally not known to a prospective employer, and because Title VII and the EEOC's regulations preclude employers from inquiring into a prospective employee's religious beliefs, it is logically necessary to place the burden upon an applicant to raise the need for religious accommodation.

A dissenting opinion concurred with the court of appeals' ruling that it was error for the district court to grant summary judgment to the EEOC, but dissented from the court of appeals' decision to the extent that it entered summary judgment for Abercrombie, stating that the case should have been remanded for trial. Importantly, the Dissent acknowledged that the court of appeals' decision applied the Tenth Circuit's "prior rendition of the elements of a *prima facie* case." Pet. App. 76a. The Dissent also noted:

> I agree with the majority that, in the ordinary case, it is the job applicant who must inform the employer that she has a religious belief that conflicts with the requirements of the job for which she is applying. This makes sense, of course, because generally it will be the job applicant who will have superior knowledge of that conflict. It is the job applicant who knows of her religious beliefs and practices.

Pet. App. 79a. Nonetheless, the Dissent advocated that the elements of a *prima facie* case laid out by the Tenth Circuit in *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000) be abandoned and proposed a new iteration of the *prima facie* case, which had not been utilized in any circuit and drew no support from any precedent from this Court. Pet. App. 81a.

The active members of the court of appeals denied EEOC's request for a rehearing *en banc*. Pet. App. 121a.

REASONS FOR DENYING THE WRIT

A. Introduction

It is undisputed that Samantha Elauf did not inform Abercrombie that her religious beliefs required her to wear a headscarf when she was at work. It is axiomatic that an employer must have actual notice that an applicant's mandatory religious practice conflicts with an employment requirement, and thus of the need for accommodation, before the employer can be held liable under Title VII for failing to accommodate the religious practice. For more than 30 years, the federal circuit courts have unanimously held that an employer must have actual knowledge that a religious conflict exists, *i.e.*, that an employee or job applicant engages in a mandatory religious practice that conflicts with employment requirements,

before the employer is required to accommodate the practice.

Accordingly, the Tenth Circuit Court of Appeals granted summary judgment to Abercrombie, holding that notice of a religious conflict would "ordinarily" be provided by a job applicant, who generally is the only one who knows whether the conflicting practice is motivated by religious beliefs (rather than by cultural traditions or personal preference) and whether she views the practice as mandatory or discretionary. The court of appeals acknowledged that in some cases an employer may obtain actual knowledge of an applicant's need for potential religious accommodation from some other source, but it found that summary judgment was warranted in favor of Abercrombie in this case because it was undisputed that Abercrombie had no actual knowledge from any source. Pet. App. 40a.

Far from creating a circuit split, the court of appeals' holding was exhaustively supported by: (1) the Tenth's Circuit's own precedent requiring an employee to inform the employer of the need for an accommodation, (2) the rulings of other circuit courts of appeals reaching the same result, (3) the court's determination that it was most "logical" to require an employee or applicant to initiate the accommodation process by informing the employer of the conflict, (4) the "EEOC's own regulatory pronouncements" that require an applicant to inform an employer of the need for religious accommodation, and (5) well-established legal principles applied in the context of

requests for accommodation made under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213. Pet. App. 29a.

The EEOC now seeks a writ of certiorari based upon a purported "conflict" among the circuit courts as to whether "direct, explicit notice [of a religious conflict] from the applicant" is necessary to hold an employer liable for failing to accommodate a religious practice. Petition, 16. The EEOC argues that liability under Title VII does not require "direct, explicit notice from the applicant" but it ignores the court of appeals' finding that Abercrombie also had no notice from any other source. Pet. App. 40a ("the EEOC is clearly mistaken on this point").

All of the circuit courts that have addressed the issue have held that applicants and employees who wear an article of clothing that is sometimes (but not always) associated with a particular religion do not thereby notify the employer that the clothing is being worn for religious (rather than cultural or personal) reasons or that they personally believe for religious reasons that it is mandatory to wear the clothing at work, *i.e.*, that there is an actual conflict with an employment requirement that makes a religious accommodation necessary. Indeed, the EEOC's own regulations confirm that applicants are not permitted to remain silent and to assume that the employer recognizes the religious motivations behind their fashion decisions. There is no "circuit split" on this question, and a writ of certiorari is not warranted on that basis.

B. There Is No Split in Authority Warranting This Court's Intervention.

1. An Employer Cannot Be Liable for Failing to Accommodate a Religious Conflict Unless it Knows that the Religious Conflict Exists.

Title VII of the Civil Rights Act of 1964, as amended in 1972, prohibits employers from discriminating against employees or job applicants on the basis of religion. 42 U.S.C. § 2000e-2(a) ("[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual because of such individual's religion."). The term "religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observation or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). *See, e.g., Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 63 (1986). An employer thus has "a statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). *See also EEOC v. Union Independentient de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002).

No accommodation is required by Title VII unless an employee's practice is based on a *bona fide* religious belief rather than on cultural traditions or

personal preference. "The requirement that the employee have a 'bona fide religious belief' is an essential element of a religious accommodation claim" because "Title VII does not mandate an employer accommodate what amounts to a 'purely personal preference.'" *EEOC v. Union Independiente*, *supra*, 279 F.3d at 56, *quoting Vetter v. Farmland Industries, Inc.*, 120 F.3d 749, 751 (8th Cir. 1997).[2]

An employer's duty to accommodate a conflict between an employee's religious belief or practice and an employment requirement cannot arise until the employer actually knows that the conflict exists. "[S]imply announcing one's belief in a certain religion, or even wearing a symbol of that religion (*i.e.*, a cross or Star of David) does not notify the employer of the particular beliefs and observances that the employee holds in connection with her religious affiliation." *Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 319-20 (3d Cir. 2008); *Chalmers v.*

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[2] "Title VII does not require the accommodation of personal preferences, even if wrapped in religious garb." *Hussein v. Hotel Employees and Restaurant Union*, 108 F. Supp. 2d 360, 370 (S.D. N.Y. 2000). *See Reed v. Great Lakes Cos.*, 330 F.3d 931, 935 (7th Cir. 2003) ("an employee is not permitted to redefine a purely personal preference or aversion as a religious belief"); *Davis v. Fort Bend County*, No. 4:12-CV-131, 2013 U.S. Dist. LEXIS 130197, *8 (S.D. Tex. Sept. 11, 2013) ("being an avid and active member of a church does not elevate every activity associated with that church into a legally protectable religious practice"; when an "[employee's] absence from work [to participate in a church event] was due to personal commitment, not religious conflict," the employer had no duty to accommodate her).

Tulou Co. of Tulsa, 101 F.3d 1012, 1020 (4th Cir. 1996), *certiorari denied*, 520 U.S. 813 (1997) (holding that an employer's knowledge that its employee was a devout Christian did not provide notice that the employee felt religiously obligated to send letters to co-workers at their homes accusing them of immorality; "[k]nowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious conduct, no matter how unusual"). In *Laney v. Ohio Dept. of Youth Services*, 448 Fed. Appx. 553, 556 (6th Cir. 2011), plaintiff was asked by her employer to remove a headscarf she wore to work, but she could not establish her claim of religious discrimination because she did not inform her employer that, as a Muslim, she was required for religious reasons to wear the headscarf at work.

In *Cary v. Carmichael*, 908 F.Supp. 1334 (E.D. Va. 1995), *affirmed sub nom. without opinion*, *Cary v. Anheuser-Busch, Inc.*, 116 F.3d 472 (4th Cir. 1997), the court explained that notice to the employer of the religious conflict is crucial for two reasons:

> First, only when sufficiently notified would any employer have a reasonable opportunity to take reasonable steps to accommodate an employee's conduct.
>
> Second, and probably more important, the notice requirement goes directly to the heart of the statute. [D]ischarge of an employee for failure to comply with valid employment requirements, where the employer does not

> have sufficient knowledge of an employee's religious beliefs or practice cannot be held to violate the statute.

908 F. Supp. 2d at 1343-44, 1346. In the instant case, Abercrombie had no notice of Ms. Elauf's religious conflict, from any source, and thus had no duty to accommodate the conflict.

2. The Court of Appeals Followed the Overwhelming Case Law Holding that an Employee or Applicant Must Ordinarily Inform the Employer that a Religious Conflict Exists.

Courts of appeals in every circuit court that have addressed the elements of a failure to accommodate claim under Title VII have repeatedly and unanimously held that an employer cannot ordinarily be held liable for failing to accommodate a religious practice of an employee until the employer is informed of the religious practice and the conflict with work requirements. *See, inter alia, Sanchez-Rodriguez v. AT&T Mobility Puerto Rico, Inc.*, 673 F.3d 1, 8 (1st Cir. 2012) ("the employee must show that he or she brought the [religious] practice to the [employer's] attention") (citation omitted); *Baker v. Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006) (plaintiffs "must show they held a bona fide religious belief conflicting with an employment requirement" and that "they informed their employers of this belief"); *Wilkerson, supra*, 522 F.3d at 319 ("[t]he employee must give the employer 'fair warning' that a

particular employment practice will interfere with that employee's religious beliefs"); *EEOC v. Thompson Contracting, Grading, Paving, and Utilities, Inc.*, 333 Fed. Appx. 768, 771 (4th Cir. 2009) (the employee must prove that he "had a bona fide religious belief that prevented him from working on Saturdays" and that he "informed [his employer] of his belief"); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 144 (5th Cir. 1982) (plaintiff must establish that "he had a bona fide religious belief that conflicted with an employment requirement [and] that he informed his employer of this belief"); *Nobach v. Woodland Village Nursing Ctr., Inc.*, No. 13-60378, 2014 U.S. App. LEXIS 15236, at *10 (5th Cir. Aug. 7, 2014) (failure to accommodate claim failed as a matter of law because plaintiff "failed to put on evidence that [employer] had knowledge of her religion"); *Burdette v. Federal Express Corp.*, 367 Fed. Appx. 628, 633 (6th Cir. 2010) (plaintiff "must show she informed her employer about the conflicts" between her "sincere religious belief [and] an employment requirement"); *Xodus v. Wackenhut Corp.*, 619 F.3d 683, 686 (7th Cir. 2010) ("[a]n employee has a duty to give fair notice of religious practices that might interfere with his employment"); *Jones v. TEK Industries, Inc.*, 319 F.3d 355, 359 (8th Cir. 2003) ("[plaintiffs] must show that they have a bona fide religious belief that conflicts with an employment requirement [and] that they informed [their employer] of this belief"); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (plaintiff must establish that "he informed his employer of

[his religious] belief and conflict [with an employment duty]"); *Thomas*, *supra*, 225 F.3d at 1155 (plaintiffs "must show [they] informed his or her employer of a [religious] belief" that "conflicts with an employment requirement"); *Morrisette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007) ("[a] Title VII plaintiff must first establish that he had a bona fide religious belief that conflicted with an employment requirement [and] he informed his employer of his belief"); *Taub v. F.D.I.C.*, No. 96-5139, 1997 U.S. App. LEXIS 41401, *2 (D.C. Cir. 1997) (plaintiff must show that he "informed" his employer of a "bona fide religious belief that conflicts" with employment requirements).

Furthermore, as the court of appeals noted, this approach is consistent with the weight of authorities under the ADA that have held that an employer's obligation to accommodate does not arise until the employee has made an adequate request for an accommodation. Pet. App. 69a-72a.

In sum, there is no split in circuit authority warranting this Court's intervention. To the contrary, the court of appeals' decision was consistent with well-established precedent in every circuit.

3. The Court of Appeals Followed the EEOC's Own Regulations, Which Recognize that an Employee or Applicant Must Ordinarily Inform the Employer that a Religious Conflict Exists.

Historically, the EEOC recognized in its regulations and guidance that an employee or applicant must inform the employer of the existence of a conflict between an employee's compulsory religious practice and the employer's work requirements. Pet. App. 68a. An employer's "obligation to reasonably accommodate the individual's religious practices" arises "[a]fter an employee or prospective employee notifies the employer of his or her need for a religious accommodation." 29 C.F.R. § 1605.2(c)(1). According to EEOC's Compliance Manual:

> An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand.
>
> * * *
>
> No "magic words" are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement. However, the applicant or employee must provide enough

> information to make the employer aware that there exists a conflict.

Id. at § 12-IV(A)(1).

The religious basis and mandatory nature of an employee's practice depend upon the employee's personal religious beliefs, which are ordinarily invisible to employers unless disclosed by the employee. The EEOC recognized that "the same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons." EEOC Compliance Manual § 12-I(A)(1). For this reason and to avoid allegations of intentional discrimination, employers have been cautioned by the EEOC to "avoid assumptions or stereotypes about what constitutes a religious belief or practice." EEOC Best Practices for Eradicating Religious Discrimination in the Workplace, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited 8/19/2014); Pet. App. 54a. The EEOC has further discouraged employers from asking applicants about their religious beliefs. EEOC, Pre-Employment Inquiries and Religious Affiliation or Beliefs, available at http://www.eeoc.gov/laws/practices/inquiries_religious.cfm; Pet. App. 54a.

Significantly, the EEOC issued new official guidance on March 6, 2014, after the court of appeals ruled in favor of Abercrombie, changing its prior positions on these issues. Instead of requiring notice from the employee, as its prior guidance had done, the EEOC announced that "[i]n some instances, even

absent a request [by the employee], it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed." *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, § 7. The EEOC apparently now believes that interviewing managers should rely upon stereotypes to make assumptions about an applicant's religious beliefs or practices, based upon their personal appearance or dress. This new guidance – cited in the EEOC's Petition – is troublingly inconsistent for employers, but it is also inapplicable to this case, which arose years prior to its issuance. Here, the court of appeals' decision was squarely in line with the EEOC's then-current guidance, as well as decades of well-established Title VII legal authority.

4. The Cases Cited By the EEOC Do Not Demonstrate a Split in Authority that Warrants Intervention by this Court.

As detailed above, every circuit has required the plaintiff asserting a failure to accommodate claim to demonstrate that the employer had actual knowledge of a conflict between the employee's religious belief and an employment requirement. The court of appeals pointed out that even the cases cited by EEOC to support a "broader view of the notice requirement" nevertheless required "some significant measure of particularized, actual knowledge" on the part of the employer, and that Abercrombie had no such knowledge from any source "even were we to assume that

an employer may be put on notice from a source other than applicants or employees." Pet. App. 36a, 39a. Title VII liability cannot be predicated "on the ground that the employer should have guessed, surmised, or figured out from the surrounding circumstances that the [employee's] practice was based upon his or her religion and that the plaintiff needed an accommodation." Pet. App. 39a.

As the court of appeals found, in each of the four cases cited by Petitioner to demonstrate a split in authority, the employer had actual knowledge of the employee's religious beliefs and the conflict with the work requirement. In two of the cases, the employee expressly requested an accommodation (time off from work) from the employer to attend a religious ceremony involving a relative, and the issue was whether the employee's notice to the employer sufficiently indicated that it was a mandatory religious ceremony. In *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993), the employee's request for time off to attend his wife's "conversion ceremony" was deemed to be sufficient notice where the employer also knew that the employee was Jewish and that his wife was converting to Judaism. In *Adeyeye v. Heartland Sweeteners*, 721 F.3d 444 (7th Cir. 2013), the employee informed his employer that he needed to travel to Nigeria to lead his father's traditional burial rites, and that this was "compulsory," *i.e.*, that his family members would suffer spiritual death if he did not attend. *Adeyeye*, 721 F.3d at 450. The court reversed summary judgment in favor of the employer, holding

that the employee's "multiple references to spiritual activities and the potential consequences in the afterlife provided sufficient notice to Heartland that Adeyeye was making a religious request." *Adeyeye*, 721 F.3d at 451. Significantly, its ruling on the knowledge issue would preclude Elauf's claims in the present case:

> The employee must make the request reasonably clear so as to alert the employer to the fact that the request is motivated by a religious belief.

Adeyeye, 721 F.3d at 450.

In *Dixon v. Hallmark Companies, Inc.*, 627 F.3d 849 (11th Cir. 2010), the employer "knew that the [employees] were dedicated Christians who had previously opposed policies prohibiting the public display of religious items in the workplace." *Dixon*, 627 F.3d at 853, 855. They had repeatedly replaced their Christian posters and religious items each time they were removed by the employer, and they "made it clear" on the final occasion that a religious poster "was not going to come down." *Dixon*, 627 F.3d at 853. The employer argued that the employees "never expressly told" it that they refused to remove the religious items "because they opposed efforts to remove God from public places," but the Court held that the employer had "enough information" from the employees "to understand the existence of a [religious] conflict." *Dixon*, 627 F.3d at 856. Abercrombie had no such information in the present case.

Finally, in *Brown v. Polk County, Iowa*, 61 F.3d 650 (8th Cir. 1995), the employee was disciplined for, *inter alia*, conducting prayer meetings at work. Although the employee never explicitly asked for accommodation the court found that the employer had "enough information to understand the existence of a conflict" because it had previously reprimanded him in writing for prior similar religious activities. *Id.* at 654.

The court of appeals thoroughly analyzed these cases and concluded that these courts "clearly have predicated their notice holdings on the employer's particularized, actual knowledge." Pet. App. 36a. Distinguishing these cases from the present case, the court of appeals found that Abercrombie had ***no knowledge*** from ***any source***:

> [E]ven were we to assume that [previous case law] would permit a plaintiff to establish a prima facie case without demonstrating that the applicant or employee was the source of the employer's notice of the need for a religious accommodation, the EEOC could not prevail here [T]here is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had such *actual* knowledge – *from any source* – that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it.

Pet. App. 34a.

In this proceeding, the EEOC cannot challenge the factual finding that Abercrombie had no knowledge from any source that Ms. Elauf wore the headscarf for religious reasons, rather than for cultural or personal reasons, or that she felt religiously obligated to wear the headscarf at work. No circuit courts have supported the EEOC's contention that merely wearing a headscarf is sufficient notice of the existence of a religious conflict and the need for religious accommodation under Title VII. Courts that have addressed similar issues have held that clothing does not provide sufficient notice of a religious conflict under Title VII because it does not inform the employer that the clothing is being worn for religious reasons, rather than cultural or personal reasons, or that it must to be worn at all times. *See, e.g., Wilkerson, supra*, 522 F.3d at 319 ("wearing a symbol of [the employee's] religion (i.e., a cross or Star of David) does not notify the employer of the particular beliefs and observances that the employee holds in connection with her religious affiliation"); *Laney, supra*, 448 Fed. Appx. at 556 (asking an employee to remove a headscarf was not religious discrimination under Title VII where the employee did not inform her employer that "she needed to wear the scarf" for religious reasons); *Baaqee v. Brock & Bleving Construction Co.*, No. 99-588-AH-C, 2000 U.S. Dist. LEXIS 9862, at *17 (S.D. Ala. 2000) (fact that Muslim employee did not drink or smoke, and wore a "Crescent Star ring which symbolizes his religion" was insufficient to show that his employer had notice); *Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d 190, 199

(D. Mass. 2004), *affirmed*, 390 F.3d 126 (1st Cir. 2004) (fact that employee wore body piercings did not inform employer that she did so based on a "religious belief" rather than a "personal preference").

Accordingly, there is no split in authority as to whether an employer must have particularized, actual knowledge that a religious conflict exists before a duty to accommodate arises, and there is no reason to grant certiorari in this case.

C. There Are No Exceptional Circumstances Warranting This Court's Intervention.

The EEOC argues in its Petition that this case presents a question of exceptional importance, citing the number of charges of religious discrimination filed with it last year and speculating (without corroboration) that the circumstances present in this case may frequently repeat themselves. Petition, 23-25. Ironically, the EEOC made the opposite argument below, assuring the court of appeals that employers need not worry about a "torrent of litigation regarding the assumptions of the employer" due to the "paucity of appellate decisions addressing the type of notice circumstances present in this case." In explaining away its own regulations, the EEOC claimed that it had not even contemplated the unique factual situation present in this case. In any event, there is no support for the EEOC's current legal position regardless of the number of charges of religious discrimination that are filed.

In reality, this case involves unique factual circumstances relating to a single individual's application for part-time employment. As explained above, the court of appeals' comprehensive decision did not establish a "new" rule of law, but rather is in accord with long-established precedent and the EEOC's own regulations. Simply put, this case does not present a question of exceptional importance worthy of this Court's review.

CONCLUSION

For all of the foregoing reasons, the EEOC's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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